SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-366

CATHERINE FISHER, et al.,
Petitioners,

v.

COPELAND REFRIGERATION CORP., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed an order of the United States District Court, Southern District of Ohio, Western Division, sustaining the Respondent union's motion for summary judgment. In its behalf, Petitioner shows unto this Court:

OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto at page 38. The decision and opinion of the United States District Court

for the Southern District of Ohio, Western Division is attached hereto at page 25. The decision of the Court of Appeals denying the petitioner's motion for rehearing is attached hereto at page 39.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Court of Appeals affirmed the order of the District Court on June 6, 1974. Petition for rehearing filed by the petitioner was denied by order of the Court on July 5, 1974.

The statutory provisions believed to confer jurisdiction of this Court to review the judgment below by writ of certiorari is Title 28, U.S.C.A., Section 1254(1) which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

In this cause the petitioner argues that the courts below misinterpreted Section 301(a) of the Labor Management Relations Act and 28 U.S.C. §§ 1331, 1337, and misinterpreted and misapplied Rule 56 of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

1. Whether a claim of unfair representation against a union alleging mishandling of the plaintiffs' grievances against an employer may be dismissed for lack of jurisdiction merely because of the claim that no collective bargaining agreement was in existence at the time the grievance arose.

2. Where the plaintiffs bring suit under Section 301 of the Labor Management Relations Act alleging that they were wrongfully discharged in violation of an existing collective bargaining agreement, may a court grant summary judgment for the defendant on the ground that no contract was in existence in the face of evidence that prior to the discharge an oral agreement had been made between union and company to continue an expired collective bargaining agreement in

order to prevent a lapse in contractual relations, and that both before and after the discharge, the company, the union and all employees, believing the contract to be in existence, op rated under and relied upon its terms?

Petitioner says the answer to the above questions is "No."

STATEMENT OF THE CASE

The plaintiffs are ten former employees of Copeland Refrigeration Corporation (hereinafter "Copeland") and are former members of Local 725, International Union of Electrical Radio and Machine Workers AFL-CIO (hereinafter, "the union") which represented 2,500 employees at Copeland's plant in Sydney, Ohio. The plaintiffs joined together to bring suit against Copeland and the union alleging, inter alia, that Copeland discharged them in violation of a collective bargaining agreement and that the union was guilty of unfair representation in its handling of their grievances arising out of this alleged wrongful discharge. Jurisdiction for the claim against Copeland is conferred by Section 301 of the Labor Management Relations Act (29 U.S.C. § 185(a)) and for the claim against the union by 28 U.S.C. §§ 1331, 1337.

The union filed a motion for summary judgment claiming the labor agreement had expired and was not in existence at the time of the plaintiffs' discharges. In its motion the union has admitted that it was the bargaining representative of the plaintiffs, but argued that the plaintiffs had no enforceable rights under a valid and subsisting collective bargaining agreement, and therefore it had no duty to represent the plaintiffs with respect to their grievances. Copeland later joined in the union's motion.

With the sole issue before the court being the existence *vel non* of a collective bargaining contract at the time of the discharges, the trial court held that there was no genuine dispute as to this fact despite substantial evidence that the union and company entered into an oral agreement to extend the contract; that after this agreement, they operated as if

the contract were in existence; that they relied on its provisions; that they made contemporaneous representations that the contract was in existence; and that the rank and file membership believed a contract to be in existence, relying upon its provisions to their detriment.

On Monday, February 17, 1970, there occurred a sitdown strike at Copeland manufacturing plant in Sydney, Ohio. The strike, which was instigated by leaders of the local union, caused all of the 2,500 plant employees to cease work. When all of the employees returned to work on February 23, 1970, twenty-seven employees including the plaintiffs were discharged for their alleged role in the strike. The issue tendered to trial court in the motion for summary judgment was whether there was a collective bargaining agreement in existence at the time of their discharge.

The union had for many years represented the employees at Copeland's plant in Sydney, Ohio. The collective bargaining agreement, executed in 1966, was scheduled to expire on June 1, 1969 and in March of 1969 a termination notice was sent by the union to Copeland.

Beginning in early 1969, the union position was challenged by District 50, United Mine Workers (hereinafter "District 50"). After a hotly contested NLRB election, the incumbent I.U.E. won the mid-June 1969 election but objections filed by District 50 prevented immediate certification. It was not until June of 1970 that the objections were finally overruled and the union was formally recertified by the NLRB.

The union, during the entire interim period from June, 1969 to June, 1970, continued to act as the representative of the employees. In May of 1969, shortly before the contract was to formally expire, the union and Copeland orally agreed to extend the contract on a day to day basis. The sworn affidavit of the company's director of labor relations, John Kaplan, tells the story:

"I took part in a meeting with IUE representatives in about May, before the contract expired. *At the meeting it was agreed that the contract would continue in effect on a day-to-day basis* during the pendency of the representation case with the NLRB . . . The actual language of the agreement to extend the contract and which I believe was put into the letter to the union's international office was as follows:

> 'Employer extended the termination date of an existing contract with IUE in order to avoid a lapse of contractual relationship while awaiting resolution of the representation case.'" (emphasis added).[1]

On May 20, 1969, Mr. Arthur Donovan, who was labor counsel for Copeland and who was present at the earlier meeting, sent a letter to union official David J. Fitzmaurice stating in part:

> "This *will confirm our agreement* between (union and company) that the contract which was signed on the 15th day of June, 1966, and which will expire at 11:59 p.m. June 1, 1969, will by mutual agreement of the company and the union, be indefinitely extended in order to avoid a lapse of contractual relations while awaiting resolution of the representation case . . .
>
> • • •
>
> If you agree with the contents of this letter, *as setting forth the arrangement that has been made,* I would appreciate it if you would sign your name . . ." (emphasis added).

Although the union never obligated Mr. Donovan by signing the letter, the conduct and representations of both the union and Copeland indicated the contract to be in existence.[2]

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[1] That this extension was legal, despite the pending challenge of District 50, was obvious at the time under the rule of *G. & H. Towing Co.*, 168 NLRB 591.

[2] The check off and union security clauses were non-operative, by

The union repeatedly exhorted its members not to violate the contract.[3] Before and after the discharge it processed and settled many grievances according to the contractual provisions and did so on the ground that the actions of Copeland violated the contract, and informed its members that grievances were being processed "per contract."[4] Sara Farley, financial secretary of the local union has testified that the "just cause" clause of the contract prohibiting wrongful discharge, and the grievance and arbitration procedure of the contract were then in effect.

Copeland took similar positions. Shortly before the contract was due to expire, the President of Copeland assured the employees that the company would operate as it had in the past with regard to working conditions and grievance procedure and repeated these assurances after the scheduled termination date of the contract. When the plaintiffs filed their grievances alleging wrongful discharge, the company took the position that the grievances were not filed as per contract, and that the grievants engaged in conduct (i.e. the sitdown strike) contrary to the existing agreement. This position was stated in Copeland's formal answer to the grievances and also by the line of questioning pursued by its labor relations director, John Kaplan, at the grievance meetings. At each of these meetings, Kaplan would first charge each grievant with violating the no-strike clause of the agreement and would then ask rhetorically:

"Do you realize that a contract exists between the IUE

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mutual agreement, in order not to run afoul of NLRB guidelines. All the rest of the contract remained in effect.

[3] For example, in a Union handbill of September 18, the union declared, "vigilance, Unity, Militancy must be the watchword for all union members who must see they stay ever vigilant that NO CONTRACT VIOLATIONS OCCUR . . ." (emphasis in original). Later in the same handbill the union members were advised that "USE OF THE GRIEVANCE PROCEDURE IS A LEGAL RIGHT BY LAW AND CONTRACT!" (emphasis in original).

[4] "Local 725 News" of February 27, 1970.

and Copeland? . . . Do you recognize that we have a legal contract between the company and the Local IUE?"

In responding to an NLRB investigation of these grievances in 1970, the company through its attorney Arthur Donovan, asserted that the contract was still in force and even sent a copy to the Board. In a letter of March 30, 1970 to the Board, Donovan stated as a fact that:

> "the contract which was about to expire on June 1, 1969, was by mutual agreement of the employer and the union (the parties to the contract) extended in order to avoid a lapse of contractual relations while awaiting resolution of the representation case 8-RC-7470."[5]

That a contract was in effect was further corroborated by the deposition of company official John Kaplan when he stated:

> "Q And the grievances were processed under the contract, isn't that correct?
>
> A Correct.
>
> Q And in making the discharges you relied heavily on the violation of the no-strike clause, do you recall that?
>
> A Correct.
>
> Q And it was your understanding at the time that you were operating under the labor agreement, isn't that correct?
>
> A Correct."

The plaintiffs submitted fourteen affidavits of employees active in union affairs all to the effect that a contract was in existence.

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[5] Donovan repeated his understanding of the facts in another letter of March 14, 1970 to the Board in which he stated that it had been "agreed . . . that the contract would continue until [the union] were certified as the bargaining agent or a new union was certified as the bargaining agent."

In spite of the evidence adduced by the plaintiffs, and in spite of the fact that the plaintiffs were denied the opportunity to depose some of the persons upon whose affidavits the motion relied, the court granted summary judgment for the defendants. It did so based solely on the fact of the union's general, conclusory affidavits signed by union and Copeland officials.

HOW FEDERAL QUESTIONS WERE RAISED

Federal questions herein were raised at the onset by the pleadings. The questions concerning the meaning of the word "contract" as it appears in Section 301 of the Labor Management Relations Act was raised in the defendant union's motion for summary judgment and before both the trial and appellate courts. The issue concerning independent jurisdiction over the claim against the union for unfair representation was asserted in the pleadings and was discussed in the briefs before the Court of Appeals.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWING THE WRIT

I. REGARDLESS OF WHETHER OR NOT A CONTRACT EXISTED, THE PLAINTIFFS' CLAIM AGAINST THE UNION FOR UNFAIR REPRESENTATION IS WITHIN THE ORIGINAL JURISDICTION OF THE FEDERAL COURT BY VIRTUE OF 28 U.S.C. §§ 1331, 1337, AND THEREFORE THE COURTS BELOW ERRED IN DISMISSING THIS ELEMENT OF THE PLAINTIFFS' COMPLAINT.

In addition to their claim for breach of the collective bargaining agreement, the plaintiffs have also asserted a claim against the union for unfair representation. The right to fair

representation is created and protected by Section 9(a) of the National Labor Relations Act, *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Breach of the duty of fair representation is a violation of Section 8(b)(1)(A) of the Act. Since the rights asserted by the plaintiffs are bottomed upon a federal statute regulating commerce, the court had jurisdiction and erred in dismissing the plaintiff's complaint *vis a vis* the union, regardless of the status of the suit against the employer.

Numerous cases from other circuits have held federal courts to have jurisdiction over claims of unfair representation under Sections 1331 and 1337; *Brady* v. *Transworld Airline, Inc.*, 401 F.2d 87 (3rd Cir. 1967), cert. denied 89 S.Ct. 680, 681 (1967); *Retana* v. *Apartment, Motel, Hotel and Elevator Operators Local 14*, 453 F.2d 1018 (9th Cir. 1972); *Reid* v. *McDonnel Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971). The decision below creates a split in the circuits over a point heretofore regarded as settled by *Vaca* v. *Sipes*, supra.

The only posible explanation for the result below may be that the court believed that in the absence of a contract there could be no duty of fair representation for the union to breach.[6] Such rationale is inconsistent with the teaching of *Vaca* that the duty of fair representation is statutory in origin. *Truck Drivers Local 568* v. *NLRB*, 370 F.2d 137 (D.C. Cir. 1967). This being so, the existence of a contract cannot be determinative of a duty of fair dealing. Consistent with this, many cases have recognized that in negotiating for a new contract, even though there may not then be a contract in existence, the union must comply with its duty of fair representation, *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128 (3rd Cir. 1972); *Cona* v. *Jim Walter Corp.*, 71 CCH Lab. Cas. ¶ 13,873 (E.D. Mich. 1973).

In this case, it is admitted that the union was the recog-

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[6] The trial court's opinion states, "the existence of a Collective Bargaining Agreement . . . is a condition precedent to recovery by the plaintiffs on the merits of their substantive claims against The Company and the Union."

nized bargaining agent of the workers and in pursuance of this role undertook to process their grievances. It is this status that creates the duty of fair representation, *Humphrey* v. *Moore*, 375 U.S. 335 (1964). The allegations of the complaint assert that the union failed to take the plaintiffs' grievances to arbitration for invidious considerations unrelated to the merits of the grievances. The union's decision not to arbitrate was alleged to have resulted from a conspiracy with the company not to reinstate the plaintiffs due to such reasons as their support of District 50, personality conflicts, criticism of union policy, making demands for full rights, and generally being "troublemakers." Such allegations, which were not disputed for purposes of the motion for summary judgment, state a claim for relief against the union independent of the question of the contract's existence and the liability of the employer.

II. THIS CASE IS APPROPRIATE FOR A WRIT OF CERTIORARI AS IT RAISES IMPORTANT AND VITAL QUESTIONS OF NATIONAL LABOR POLICY AND CIVIL PROCEDURE.

A. The Determination below that no contract existed was contrary to law and fact and inimical to a sound National labor policy.

The substantive questions in dispute are of substantial import in the labor relations field. At issue is under what circumstances contractual relationships exist during the temporary hiatus that occurs when a collective bargaining agreement is formally terminated in order to allow negotiations for a new one. Although sometimes a company and union formally agree to extend the old contract until a new one is executed, often the situation is clouded due to the lack of a clear or formal agreement. Such situations constantly recur and are in need of clarification by a pronouncement from

this Court. For one reason or another the same working conditions, wages, and benefits and grievance procedures may be continued thus giving the illusion of a continuation of a contract. There may be an informal or implicit arrangement whereby both company and union operate as if the contract continued in existence. There may also be situations where, as a matter of law, the company is obliged to maintain the same rights and conditions as were embodied in the expired contract. In all of these situations there is uncertainty as to the rights and remedies of both the parties as to the contract and the employees who are the intended beneficiaries of the contract.

Courts have typically resolved such questions by applying traditional common law rules to determine whether a contract in the consensual sense of the word exists. This approach is sound as far as it goes, but it may be insufficient to delineate all of the situations in which a contract within the meaning of Section 301 may be found. Common law doctrine, by narrowing the inquiry to the existence of a meeting of minds between company and union, allows the rights of scores of working people to depend upon the intracacies of backroom negotiations, while ignoring the reasonable and legitimate expectations of employees. If, for example, the employees are told by both union and company that there is a contract in existence and that they have rights thereunder, but the union and company never actually agreed upon or formalized a bargain, under the consensual approach, the employees would have no contractual rights such as freedom from arbitrary discharge or utilization of grievance and arbitration. Such a result is plainly unconscionable. In view of the stricture of *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), that the substantive rules governing 301 suits are not to be limited by common law principles but rather are to be formulated from "the range of judicial inventiveness," such a limited inquiry as to whether or not an actual meeting of the minds occurred may be inadequate to satisfy the needs of national labor policy.

The issues in this case go to the very essence of the word "contract" as applied to a collective bargaining agreement, and involve how the courts should fashion rules to resolve important 301 disputes.

1. There is substantial evidence and legal authority supporting an actual or implied agreement between Copeland and the union to continue the contract in order to prevent a lapse of the contractual relationship during the pendency of the NLRB proceedings.

Even in the traditional, consensual sense of the word, the plaintiff has offered to the trial court enough evidence from which a contract could be found.

The evidence establishes that an oral agreement to continue the agreement was made in the company offices in May, 1969, and that subsequently the parties conducted themselves in all respects as though the contract was in full force. Further, as found by the trial court, "the defendant Company during the period June 2, 1969 to June 2, 1970, maintained the working conditions which existed under the prior agreement."

The trial court held that because the union refused to sign the Donovan letter of May 20, 1969, no contract was formed. If this is a ruling "as a matter of law," it is in conflict with authority from numerous other circuits.

Failure to formalize a contract is only fatal where the parties at the onset intend a writing as a condition precedent to its effectiveness. *United Steelworkers of America* v. *Rome Industries*, 321 F. Supp. 1170 (N.D. Ga. 1970). Of course, the question of the intent of the parties is one of fact rather than law. *United Steelworkers of America* v. *C.C.I.*, 57 CCH Lab. ¶ 12,638 (10th Cir. 1968). As a question of fact, it is often resolved by examining the conduct of the parties subsequent to the verbal agreement. Where, as here,

the parties operated as if the contract were in effect, this fact tends to show that the oral agreement alone was intended to be effective. For example, in *Teamsters Local 524* v. *Billington*, 402 F.2d 511 (9th Cir. 1968), it was held that where the company has been complying with the terms of the contract, once company and union verbally agree, a contract is formed notwithstanding refusal of company to sign the document in question.

In addition, even where the parties do intend to reduce an agreement to writing, subsequent conduct of the parties in acting under and relying upon the terms of a contract can itself create a binding and enforceable labor contract, *Roadway Express, Inc.* v. *Teamsters Local 249*, 330 F.2d 859 (3rd Cir. 1964).

Thus, consistent with the above, many courts in the context of labor-management relations have found a binding oral agreement despite the failure of the parties to embody it in writing or to sign a written memorialization of it: *Smith* v. *Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3rd Cir. 1972); *United Steelworkers of America* v. *C.C.I. Corp.*, 395 F.2d 529 (10th Cir. 1968); *N.L.R.B.* v. *Local 825, International Union of Operating Engineers AFL-CIO*, 315 F.2d 695 (3rd Cir. 1963); *Muth* v. *J. W. Speaker Corp.*, 151 F. Supp. 188 (E.D. Wisc. 1957) aff'd 262 F.2d 797; *Comerata* v. *Chaumont, Ins.*, 52 N.J. Supr. 299, 145 A.2d 471 (1958); *C. D. Perry & Sons, Inc.* v. *Robolitto*, 39 Misc. 2d 147, 240 N.Y.S.2d 331 (Sup. Ct. 1963).

Even without an explicit oral agreement, by virtue of the conduct and representations of the union and company, it is factually possible to find an implied-in-fact understanding to continue the prior contract in effect. An implied contract differs from an express contract only in that the agreement is inferred from the conduct of the parties. In the case at bar, all parties acted as if a contract were in existence and stated this to be so on numerous occasions. And in fact the working conditions were maintained as they were under

the prior contract. Grievances were processed by the union on the ground that Copeland violated the contract and were denied by Copeland on the ground that the employee in question violated the contract. Thus, by their actions did the parties signify their agreement to continue the old agreement until a new one could be negotiated.

Numerous cases where an express agreement was lacking have implied labor contracts from actions of company and unions, *Broadway-Hale Stores, Inc.* v. *Retail Clerks Union Local No. 428*, 361 P.2d 705 (Cal. 1961) (lower court holding that the prior labor agreement was extended during the period of bargaining, was supported by the fact that preexisting conditions were maintained, by the continuity of roles of union and company and employees *vis à vis* each other, by the continued use of grievance procedures of the contract, and by the fact that the company failed to raise defense of no contract in the grievance procedure); *Kentucky Skilled Craft Guild* v. *General Electric Co.*, 431 F.2d 62 (6th Cir. 1970) ("course of dealings engaged in by the parties created a supplemental agreement-in-fact . . ."); *N.L.R.B.* v. *Scientific Nutrition Corp.*, 130 F.2d 447 (9th Cir. 1960); *United Mine Workers of America* v. *Roneco*, 232 F. Supp. 865 (D. Wyo. 1964); *Bangor & Aroostack Railroad Company* v. *Brotherhood of Locomotive Firemen and Enginemen*, 442 F.2d 812 (D.C. Cir. 1971); *RaBouin* v. *N.L.R.B.*, 195 F.2d 812 (2nd Cir. 1952); *Journeymen Barbers, Hairdressers, etc.* v. *Pollino*, 22 N.J. 389, 126 A.2d 194 (1956) (where parties treated expired agreement as still in force court held it to actually be in force).

In view of the above authorities, if the holding below – that the mere refusal of the union to initial the Donovan letter of May 20, 1969 negates the existence of a contract – represents a determination of law, it can only be regarded as incorrect or as presenting a split in the circuits. Other than as a legal determination, the only basis for the decision can be that the court made a factual determination as to the existence of a contract. This is equally in error.

It is elementary that a summary judgment is only to be granted where there is no genuine issue of material fact, *Federal Rules of Civil Procedure, Rule 56(C).* The court below, instead of limiting its inquiry to finding whether or not a factual conflict existed, made its own determination of which of the two conflicting stories to believe. For example, the court has stated: "The undisputed evidence discloses that no oral agreement extending the duration of the 1966 to 1969 bargaining agreement was entered into by the parties." This cannot be squared with the 1970 affidavit of John Kaplan previously quoted above:

> "I took part in a meeting with the IUE representatives in about May 1969, before the contract expired. At the meeting it was agreed that the contract would continue in effect on a day-to-day basis during the pendency of the representation case with the NLRB."[7]

In this connection it looms significant that in Kaplan's 1972 affidavit filed by the defendants in support of their motion, he only denies the existence of a written contract and does not deny an oral agreement. It is also revealing that in its brief to the Court of Appeals, the union brief could only counter the Kaplan affidavit quoted above by labeling it as "not accurate" or "in error." This, of course, implicitly concedes the presence of a dispute of material fact.

In this case, giving the refusal to sign and the union affidavits their full weight, the evidence still shows that the parties treated the contract as in effect and made numerous representations to that effect. Despite whatever contrary facts or arguments that the defendants may muster, plaintiffs' evidence tends to show that the parties regarded themselves as bound by the oral agreement. Since in a motion for summary judgment the inferences are to be resolved in favor of the opponent of the motion, and since the plaintiffs'

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[7] The 1970 affidavit was made in connection with an NLRB proceeding.

evidence shows a contract to exist, there must be said to be a genuine issue of material fact as to the existence of an agreement, actual or implied, to extend the contract.

The procedural and substantive aspects of this case are perfectly mirrored in the decision of *Roadway Express, Inc.* v. *Teamsters Local 249,* 330 F.2d 859, (3rd Cir. 1964). In this 301 suit for damages for violation of a no-strike clause of a contract, the existence of the contract was disputed. The alleged contract in *Roadway* arose from an oral agreement reached during a prior strike. The employees returned to work under the terms of the oral agreement even though there was no exchange of signed contracts. When disputes arose the employer submitted a written contract which the union refused to sign. A second strike broke out and the suit resulted. The court of appeals reversed the granting of a motion for summary judgment for the defendants, stating "the fact that the proposed written agreement was not signed did not demonstrate as a matter of law that there was no contract." The court quoted *Williston On Contracts,* Section 28A to the effect that even where a formalization of an oral contract is contemplated by the parties, this may be dispensed with by "subsequent agreement manifested by acts." As to the propriety of summary judgment, the court stated:

> ". . . Whether [the company] believed or should not have believed that there was an agreement was a question of fact to be resolved by the trier of facts . . . Whether Local 249 ever recognized that a written contract was binding upon it is a genuine issue of material fact precluding the entry of 'summary judgment.'"

Thus, either as a ruling of law or a determination of fact, the decisions below were in error and in conflict with the decisions of other circuits.

2. Because of the continued oral representations by both union and Copeland that a contract existed, a contract by estoppel should be found.

Even if no contract ever came into existence by a process of express or implied agreement, nevertheless, a contract by estoppel should be found under the circumstances of this case.

The record shows that subsequent to the May, 1969 meeting, the parties acted under the terms of the contract, believed the contract to be operative, and told the 2,500 employees and union members that there was a contract. Further, the employees were assured by Copeland that working conditions would remain the same. Both parties reaped the benefit of the labor stability which contractual provisions such as the grievance machinery and no-strike clause provided. For almost one year and except for the two day sit-in, the employees, in reliance upon the existence of the contract, refrained from striking or picketing or seeking individual contract modification or wage increases. If the union and company had announced there was no contract, no grievance machinery, no prohibition against arbitrary discharge, chaos surely would have resulted.

Where third party beneficiaries justifiably rely upon the existence of a contract, the actual parties are estopped to deny its existence, *Simmons* v. *Western Assurance Co.*, 205 F.2d 815 (5th Cir. 1953), *Aetna Insurance Co.* v. *Eisenberg*, 294 F.2d 301 (8th Cir. 1961), particularly when the "parties to the contract exploit" it for their own advantage.

To allow this company and union to now, in the midst of litigation, disavow what was to their advantage to proclaim at the time would shatter the statutory intent of Section 301. The purpose of he Act is to promote industrial peace and stability and therefore the policy of the Act favors the continuation of labor agreements, *F. W. Means* v. *NLRB*, 377 F.2d 683 (7th Cir. 1967). National labor policy should play a decisive role in the interpretation of labor agreements.

As stated in *Richardson* v. *Communication Workers of America*, 443 F.2d 974 at 979 (8th Cir. 1971):

> "Federal jurisdiction under Section 301 is more than a proving ground for breach of employment contracts; it is rather a statutory ground for suits brought to implement labor policy as suggested by the Labor Management Relations Act."

If rank and file working people are told and reasonably believe that a contract exists and are further induced to act as if a contract does in fact exist, their legitimate expectations should be protected. If such expectations are dashed, the inevitable result must be the sacrifice of industrial peace and tranquility. To avoid such results, a contract by estoppel must be found in this case.

3. A contract implied in law should be found to exist in this case.

It has been argued by the defendants and apparently accepted by the lower courts here that working conditions were maintained solely due to the compliance by Copeland with legal requirements. The argument is that under *Katz* v. *United States*, 369 U.S. 736 (1962), for Copeland to have made changes in the working conditions would have violated its duty to bargain in good faith under section 3(a)(5) of the Act. Thus, the argument continues, their action in this regard cannot be read to constitute an implied agreement to extend the contract. For various reasons the plaintiffs have asserted that Copeland was not under any such legal restraint,[8] and further that even if they were, this does not

[8] Copeland could not have violated 8(a)(5) because during this period in question they were not negotiating for a new collective bargaining contract. Indeed, under the rule of *Midwest Piping*, 63 NLRB 1060 (1945), they could not negotiate for a new agreement because of the challenge of District 50. Obviously where collective bargaining is not in fact in progress, unilateral changes cannot conceivably be in

negative an actual agreement to extend the contract notwithstanding a legal duty to continue its terms and conditions.

Assuming, however, that the courts below properly interpreted and applied the *Katz* doctrine, this creates an anomalaous situation in that on one hand, by virtue of law, the employees were granted continued contractual rights but on the other hand are deprived of a federal forum in which they may enforce these rights. To assert that such a holding is contrary to the recognized policy of protecting and preserving industrial peace and the stability is to state the obvious. The law should not on the one hand tell workers that their contractual rights are continued and then on the other deprive them of opportunity to assert these rights. A right without a remedy is meaningless. In effect, the workers would have rights only in the event the employer chooses to honor them. This can only lead to bitterness, resentment and hostility on the part of the employees.

For these reasons it should be held that where as a matter of law contractual rights continue to exist, for purposes of Section 301 there exists a contract implied-in-law. This is consistent with venerable notions of common law whereby contracts implied-in-law were found or created despite the lack of an agreement when justice so required, see generally, *Clark* v. *People Savings & Loan Assn.*, 221 Ind. 168, 45 N.E. 2d 681, 194 A.L.R. 1495 (1943); *Thomas* v. *R. J. Reynolds Tobacco Co.*, 350 Pa. 262, 38 A.2d 61, 157 A.L.R. 1432 (1932).

This Court has previously permitted suit under 301 to protect rights created not by a consensual act but rather by law. In *John Wiley and Sons* v. *Livingston*, 376 U.S. 543 (1964), this Court permitted suit under Section 301 to en-

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breach of a duty to bargain in good faith, see *NLRB* v. *Minute Maid Corp.*, 283 F.2d 705 (5th Cir. 1960), *NLRB* v. *Generac*, 354 F.2d 625 (7th Cir. 1965); *NLRB* v. *Downtown Bakery*, 330 F.2d 921 (6th Cir. 1964). Further, even if *Katz* does apply the company could still make changes by giving notice to the union and also was entirely free to change items which are not mandatory bargaining points under § 8(d).

force an arbitration clause upon a successor employer which had never signed the contract. This Court noted that under principles of ordinary contract law, the successor employer would not be bound by the arbitration clause, but went on to recognize that "a collective bargaining contract is not an ordinary contract." The Court elaborated further:

> "by the requirements of the National Labor Relations Act [a collective bargaining agreement] is not in any real sense the simple product of a consensual relationship."

The *Wiley* Court found a duty to arbitrate not on the basis of a consensual act but upon the construction of the duties contained in the original contract "in the context of a national labor policy." Thus, where, as in *Wiley,* or where as a result of the *Katz* doctrine, contract rights are imposed by operation of law, these rights just as other contract rights should be vindicated by a suit under Section 301.

The reasoning and approach of *Wiley* should be utilized to examine in its entirety the facts posed in the case at bar, which constantly recur in the field of labor relations and can be summarized as follows: By its terms a collective bargaining agreement expires and, because of a challenge by a rival union and NLRB proceedings resulting therefrom, bargaining for a new contract cannot proceed. The parties fully intend in the future to enter into a new agreement. In addition, there are assurances given by the president of the company that conditions existing under the prior contract will remain unaltered and, in fact, this is the case. And finally, all of the parties state that a contract exists, believe that a contract exists, and act upon these statements and beliefs. Where such a situation occurs, and where there is no express and explicit renunciation of a continuation of the contract, there should not be a lapse of contractual relations during the hiatus period between old and new contracts. The parties should not be cast adrift without defined rights and duties. Rather, it should be held that as a matter of law there exists a contract within the meaning of section 301. If this Court is

unwilling to make so sweeping a substantive pronouncement, it should, at the very minimum, hold that in such a situation there is a presumption that the contract continues, with the burden placed upon the party asserting to the contrary to rebut it. In no way, however, can it reasonably be held that in such a situation there is not even a genuine dispute as to the existence of a contract. In one way or another, it is imperative for this court to speak on this critical aspect of labor management relations.

B. The Courts below erred in granting summary judgment in the face of a clear dispute of material fact and in relying heavily upon affidavits of interested witnesses without allowing full discovery of the facts to the plaintiffs.

As stated above, there was a genuine dispute as to material fact. The defendants offered evidence that there was no contract and the plaintiffs showed an oral agreement followed by conduct consistent with that agreement. This clearly is a dispute and one that goes to the heart of the case. Thus, in granting the summary judgment, the courts below flouted many generally accepted rules regarding summary judgment, including:

1. Summary judgment should not be granted where there is a bona fide dispute as to "intent" of the parties.

2. Summary judgment should not be granted on the basis of affidavits of hostile or interested witnesses.

3. Where the state of the law governing the disputed questions is not clear and fully developed, a trial is advisable.

4. Any inferences to be drawn from the non-controverted facts must be drawn in a light most favorable to plaintiff.

5. Where there is a disagreement as to the "inferences"

to be drawn from the facts, summary judgment is not appropriate.[9]

Additionally, the judgment was based on affidavits of union or company men who were interested and hostile witnesses. Further, because of the lack of cooperation of the union, the plaintiffs were never able to depose or cross-examine five of these affiants. Thus, there has never been a complete record made on this case. This is contrary to the usual practice of allowing full access to the facts to the opposing party, *Curto's Inc.* v. *Krich New Jersey, Inc.*, 193 F. Supp. 235 (D.N.J. 1971), and further contradicts the teaching of this Court that "the mere fact that the witness is interested in the result of the suit, is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sartor* v. *Arkansas National Gas Corp.*, 321 U.S. 620 (1943).

As this Court has stressed so well, "trial by affidavit is no substitute for trial by jury. . ." and "summary judgment should be used sparingly where motive and intent play leading roles." *Potter* v. *CBS*, 368 U.S. 464 (1962). These rules are particularly appropriate for an action under Section 301, for such suits are the ultimate protection for collective bargaining agreements, which in turn are recognized as the cornerstone of labor management stability. Such rights which go to the heart of the national labor policy, must not be so cavalierly treated. On the contrary, the plaintiffs' rights should receive the full protection afforded by law. Plaintiffs are entitled to their day in court. The procedural aspects of this case alone are enough to justify certiorari on the ground that the courts below have "so far departed from the accepted

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[9] These rules are supported by abundant authority including in part *Estopp* v. *Norfolk & Western Ry. Co.*, 192 F.2d 889 (6th Cir. 1962); *Dochler Metal Furniture Co.* v. *United States*, 149 F.2d 130 (2nd Cir. 1945); *Natural Screen Service Corp.* v. *Poster Exchange, Inc.*, 305 F.2d 647 (5th Cir. 1962); *United States* v. *Kansas Gas & Electric Co.*, 287 F.2d 601 (10th Cir. 1961).

and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Supreme Court Rule 19(1)(b)).

CONCLUSION

The courts below failed to recognize the independent jurisdiction for the plaintiffs' unfair representation claims against the union. In addition, in contravention of the clear directive of Rule 56, and with a blind eye towards the facts offered by the plaintiffs, they granted summary judgment on an issue of fact which was clearly in dispute. The manner in which the plaintiffs' claim were disposed of is tantamount to a deprivation of due process. The courts below ignored both established principles of contract law and salutory doctrines of labor policy.

This petition presents more than a case erroneously decided. This case involves critical rights of working people. It probes a recurrent problem of labor management relations of continuous real concern to labor, management and employees. This case deals with an area of labor law badly in need of clarification by this Court. On the essential issue of the existence of a contract, the decisions below are in irreconcilable conflict with the other circuits. This case raises the fundamental problem of what constitutes a contract within the meaning of Section 301, and how federal courts must decide this question. This litigation, by demonstrating that this Court's prior admonitions of *Lincoln Mills* and *John Wiley* have fallen on deaf ears, also provides a vehicle for the reassertion of the principle that in 301 suits, our lower federal courts must go beyond common law principles and creatively fashion rules within the context of the realities of labor management relations and the announced policy of the labor law.

PRAYER

For the foregoing reasons, petitioners pray that a writ of certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the judgment of that court and the order of the United States District Court for the Southern District of Ohio, Western Division may be reviewed by this Court and reversed and remanded with direction that the motion for summary judgment be denied and that after completion of discovery, the matter proceed to trial.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION 4255

CATHERINE E. FISHER, ET AL.,
Plaintiffs,

vs.

COPELAND REFRIGERATION CORP.
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO

and

LOCAL 725, INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS AFL-CIO,
Defendants.

MEMORANDUM OPINION AND ORDER

(Filed June 4, 1973)

This is a wrongful discharge action brought by nine former employees of the defendant Copeland Refrigeration Corporation against their former employer and their bargaining representatives, International Union of Electrical, Radio and Machine Workers AFL-CIO and Local 725, of said International Union. In their complaint the plaintiffs allege that the defendant Copeland Refrigeration Corp. [hereinafter referred to as the Company] breached a Collective Bargaining Agreement by discharging the plaintiffs in February of 1970

and that the defendants International Union of Electrical, Radio and Machine Workers AFL-CIO and its Local 725 [hereinafter referred to as the Union] breached its duty of fair representation by refusing to take grievances filed by the plaintiffs to arbitration. The plaintiffs also request this Court to exercise pendent jurisdiction over a claim of invasion of privacy based upon an alleged conspiracy between the defendants to subject the plaintiffs to public humiliation by removing the plaintiffs from the defendant's plant in full view of other employees following a sit down strike.

Jurisdiction of this Court is invoked under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, which vests this court with original jurisdiction over "suits for violation of contracts between an employer and a labor organization."

The defendants have moved for summary judgment dismissing this action on the ground that this Court lacks subject matter jurisdiction for the reason that the 1966 Collective Bargaining Agreement between the Company and the Union was terminated effective June 2, 1969 and no Collective Bargaining Agreement was in effect at the time of the plaintiffs' alleged wrongful discharge.

The defendant Company has also moved to dismiss the complaint as to plaintiffs Fisher, Mumford, Manson, Schaffner, Killian, Kriegel and Davis for failure to state a claim upon which relief can be granted for the reason that these plaintiffs were plaintiffs in prior actions against this defendant where the same cause of action was finally adjudicated and the present claims of the named plaintiffs are barred by the defense of res judicata.

Motion of the defendant Company and Union for summary judgment for lack of subject matter jurisdiction.

Article XVI of the 1966 Collective Bargaining Agreement between the Company and the Union provides:

> "Section 58. This agreement shall continue in full force and effect until 11:59 p.m., June 1, 1969, and shall

continue in effect from year to year thereafter unless notice of termination or modification in writing by registered mail is given by either party at least sixty (60) day before the next annual expiration date. Within ten (10) days after receipt of said notice, both parties to this agreement, through their representatives, shall confer and negotiate."

The affidavit of Nick York, President of Local 725 discloses that on March 24, 1969 Mr. York gave notice to terminate the 1966 Collective Bargaining Agreement by letter sent to John Kaplan, Manager of Personnel Practices, for the defendant Company. The March 24, 1969 letter provided as follows:

"Dear Mr. Kaplan:

In accordance with Article XVI, Sec. 58 of the Agreement between Copeland Refrigeration Corporation and the International Union of Electrical Radio and Machine Workers, AFL-CIO, Local 725, please consider this a notice of termination or modification.

Will you please notify the local union office as to the date, time and place you are prepared to meet with the Union Committee to enter into negotiations.

Sincerely,
s/Nathaniel York
Nathaniel York-President
IUE-AFL-CIO Local 725"

On March 25, 1969 an administrator was placed over IUE Local 725 by the International Union pursuant to request by the membership of Local 725. The Company was notified of the administratorship on or about April 1, 1969. Local 725 remained under administration by the International Union for a period from March 25, 1969 to January 8, 1970. Mr. Jack Inteso served as administrator for Local 725 IUE from March 25, 1969 to September 8, 1969 when he was replaced as administrator by Orville Munzer. Mr. Munzer served as

administrator of Local 725 IUE from September 8, 1969 to January 8, 1970 on which date the administratorship of Local 725 was terminated by the International Union. The affidavits submitted by Mr. Inteso and Munzer aver that no Collective Bargaining Agreement or extension of the 1966 agreement was executed between the Local Union and the Company during the period of administration.

On January 8, 1970 Billy Ballou assumed the office of President of IUE Local 725 and served in that capacity until January 8, 1972. The affidavit submitted by Mr. Ballou discloses that no Collective Bargaining Agreement was entered into by the Company and the Union until June 1, 1970 when Mr. Ballou on behalf of the Local Union executed a memorandum of agreement which placed into effect the Collective Bargaining Agreement which had expired on June 2, 1969. Ballou's affidavit further discloses that the Local Union on the advice of counsel declined to execute a new Collective Bargaining Agreement or an extension of the 1966 agreement because of the pendency of a representation petition filed with the National Labor Relations Board by the International Union of District 50 United Mineworkers of America in 8-RC-7470 on April 1, 1969.

The affidavit of John Kaplan Personnel Director for the defendant Company discloses that on or about March 25 or 26, 1969 he received a letter from Nathaniel York, President of IUE Local 725, terminating the 1966 through 1969 agreement effective June 2, 1969. The Kaplan affidavit further avers that a form of agreement dated May 20, 1969 extending the contract on a day to day basis was signed by the Company's attorney, Arthur Donovan, but that the Union refused to sign the agreement.

In summary the evidence presented by the defendants in support of their motion for summary judgment discloses that notice of termination of the 1966 to 1969 agreement effective June 2, 1969 was sent to the Company on March 24, 1969, that no agreement extending the 1966 to 1969 contract

was entered into by the parties until June 2, 1970 and thus no bargaining agreement was effective between the Company and the Union at the time of the alleged wrongful discharge of the plaintiffs in February, 1970.

The existence of a Collective Bargaining Agreement between the Company and the Union is a prerequisite to this Court's jurisdiction under Section 301 of the Labor Management Relations Act and further is a condition precedent to recovery by the plaintiffs on the merits of their substantive claims against the Company and the Unions. If the termination notice sent to the Company on March 24, 1969 is valid and no agreement expressed or implied extending the 1966 to 1969 contract was effective at the time of the plaintiff's alleged wrongful discharge, this Court lacks jurisdiction over the subject matter or in the alternative plaintiff's substantive claims which are premised upon the existence of a bargaining agreement at the time of discharge must fail.

The plaintiffs resist the defendants' motion for summary judgment on the following grounds:

1. That the termination notice is void because President York of the Local Union lacked authority to act on behalf of the Union and the termination notice is ambiguous.

2. The Company and the Union entered into an oral contract extending the terms of the 1966 to 1969 Collective Bargaining Agreement, and

3. That an implied agreement or contract by estoppel resulted from the conduct of the parties.

The Court finds the plaintiffs' contentions to be unmeritorious.

Plaintiffs' assertion that President York lacked authority to send the March 24, 1969 letter of termination is based upon a claim that the Local Union was placed under a trusteeship by the International Union on March 23 or 24, 1969 and that therefore only an administrator appointed by the International

possessed authority to issue the termination notice. Plaintiff relies upon documentary evidence disclosing that a membership meeting to consider the imposition of a trusteeship was held on March 23, 1969 and the trusteeship reports filed by the International pursuant to the Labor Management Reporting and Disclosure Act which state that the trusteeship was established on March 24, 1969. Assuming that the trusteeship was imposed prior to the time Mr. York sent the notice of termination this fact would not render the termination notice void. The Company was not advised that a trusteeship was established until April, 1969 and President York clearly had apparent authority to act on behalf of the Local Union. The notice of termination was not repudiated by any administrator appointed by the International. Assuming that Mr. York lacked authority to act on behalf of the Local Union, the failure of the various administrators to repudiate the termination notice or to otherwise to advise the Company that it was void constitutes a ratification of Mr. York's conduct which is binding on the Union.

Article XVI, Section 58 of the Agreement provides that the agreement shall continue into effect from year to year thereafter unless "notice of termination or modification" is given in writing by registered mail at least sixty days before the next annual expiration date. The termination notice utilizes the contractural language "notice of termination or modification" and discloses an unequivocal intent on the part of the Union to exercise its termination rights under the contract. The notice is not embiguous.

The undisputed evidence discloses that no oral agreement extending the duration of the 1966 to 1969 bargaining agreement was entered into by the parties. In a letter to David J. Fitzmaurice, Secretary-Treasurer IUE AFL-CIO dated May 20, 1969, Arthur Donovan, attorney for the Company, proposed that the parties by mutual agreement indefinitely extend the contract during the pendency of the representation case filed by the International Union of District 50, UMWA. This letter requested that Mr. Fitzmaurice indicate his ap-

proval and agreement by signing his name at the lower left hand corner of the letter. The affidavit of Mr. Kaplan discloses that Mr. Fitzmaurice refused to sign this letter. Since the agreement between the parties clearly contemplated the approval by Mr. Fitzmaurice it is clear that there was no meeting of the minds between the parties extending the 1966 to 1969 Collective Bargaining Agreement.

Finally, the plaintiffs' contend that an implied contract or contract by estoppel resulted from representations made by responsible officials of the Company that a contract existed and the Company's conduct in maintaining after June 2, 1969 the same terms and conditions of employment that existed under the expired 1966 to 1969 agreement.

The evidence submitted by plaintiffs discloses that during the processing of grievances filed by the plaintiffs and during the processing of unfair labor practice charges filed by the plaintiffs with the NLRB, the attorneys and officials of the defendant Company took the position that the plaintiffs' discharge was lawful because the sit down strike constituted a breach of the Collective Bargaining Agreement as well as an illegal seizure of the Company's plant. Statements of legal theory advanced by the Company in processing grievances or in resisting unfair labor practice charges before the NLRB are not binding on the Company or this Court where the facts disclose that a Collective Bargaining Agreement was not in existence at the time of the plaintiffs' discharge.

In support of its position that an implied contract arose as the result of the defendant Company's conduct the plaintiffs have submitted in opposition to the defendants' motion letters dated May 27, 1969 and July 1, 1969 sent to all Copeland employees in which Mr. Frank J. Gleason, President of the Company advises the employees that the Company will continue to operate as it had in the past year with regard to pay, fringe benefits, seniority, working conditions and grievances. Plaintiffs have also submitted the affidavits of various Copeland employees disclosing their belief that the

Company and the Union during the period June 1969 to July 1970 were operating under and were abiding by the terms of the 1966 Collective Bargaining Agreement.

This evidence establishes that the defendant Company during the period June 2, 1969 to June 2, 1970 maintained the working conditions which existed under the expired agreement. This conduct on the part of the Company, in the factual context of this case, looses its significance because during the period in question a representation petition filed by the International Union of District 50 UMWA seeking certification as representative of the Company's production and maintenance employees was pending before the NLRB.

Under the so-called Midwest Piping rule, 63 NLRB 1060 (1945) an employer faced with rival representation claims raising a real question of representation must maintain a strictly neutral position and not bargain with any union as to the employees involved in the representation dispute until the Union's right to be recognized is finally determined by the procedures provided by the National Labor Relations Act. 48 Am. Jur. 2d Labor and Labor Relations Section 594. Where a real question of representation exists an employer who enters into a Collective Bargaining Agreement with one of two or more rival unions commits an unfair labor practice. N.L.R.B. v. Signal Oil and Gas Co., 303 F.2d 785, 787 (C.A. 5 1962). Furthermore, the expiration of a Collective Bargaining Agreement does not relieve an employer of its statutory duty to bargain in good faith and an unilateral charge in the terms and conditions of employment without negotiating with the certified bargaining representative of the employees constitutes an unfair labor practice. 48 Am. Jur. 2d Labor and Labor Relations Section 727. Had the defendant Company changed the terms and conditions of employment existing under the expired agreement it might well have been found guilty of an unfair labor practice. By maintaining the terms and conditions of employment existing under the expired contract during the pendency of the representation dispute the defendant Company avoided potential liability for a

violation of the National Labor Relations Act as amended, 29 U.S.C. Section 151 et seq. Such conduct does not give rise to an inference that the defendant Company impliedly extended the duration of the 1966 to 1969 bargaining agreement.

In analogous situations the Courts that have considered this question have declined to recognize the existence of an implied collective bargaining agreement on the basis of an employer's failure to change the terms and conditions of employment which existed under an expired agreement. Baker v. Fleet Maintenance, Inc., 409 F.2d 551 (C.A. 7, 1969); Proctor and Gamble Ind. Union v. Proctor and Gamble Mfg. Co., 312 F.2d 181 (C.A. 2 1962), cert denied 374 U.S. 830 (1963); Food Handlers etc. v. Arkansas Poultry Co-op, Inc. 199 F. Supp. 895 (W.D. Ark. 1961).

In Baker v. Fleet Maintenance, Inc., supra seventeen discharged employees brought suit under Section 301(a) of the Labor Management Relations Act against their alleged employers for wrongful discharge in violation of a Collective Bargaining Agreement. The bargaining agreement contained a termination clause similar to Article XVI Section 58 of the Copeland Agreement, which provided that the contract would continue from year to year after its expiration date unless written notice was served at least sixty days prior to the expiration date. In the Baker case, supra the Court of Appeals for the Seventh Circuit held that where seventy eight days before the contract's expiration date notice was given of the Union's desire to negotiate a new contract wage agreement, and the alleged wrongful discharge occurred after the expiration date of the contract, the District Court could properly determine that no collective bargaining agreement was in existence at the time of the plaintiffs' discharge and deny relief for wrongful discharge. The Court in Baker rejected the plaintiffs' contention that there was an implied extension of the bargaining agreement and stated as follows:

> "The plaintiffs' next contention is that an extension of the bargaining agreement should have been implied. Although the Supreme Court in Retail Clerks v. Lion Dry

Goods, 369 U.S. 17, (1962), indicated that claims other than those arising directly from a collective bargaining agreement may be brought in a section 301 suit, we read that case as limited by its facts to the exceptional situation where an employer and a labor organization have expressly entered into a 'strike settlement' agreement which is sought to be enforced in a federal court. In the *Lion Dry Goods* case the grant of section 301 jurisdiction to enforce the strike settlement agreement promoted the national labor policy of encouraging industrial peace through private bargaining. This policy consideration is not present in the suit before us. Additionally, the agreement in *Lion Dry Goods* was more explicit than the extension understanding which the plaintiffs request us to imply here. Our decision that no implied extension of the contract's term is supported by the decisions of other federal courts in analogous situations. [Citing cases]." 409 F.2d at pages 554-555.

In the case of Proctor and Gamble Independent Union v. The Proctor and Gamble Mfg. Co. supra the Court of Appeals for the Second Circuit reversed a summary judgment granted by the district court compelling the defendant to arbitrate certain grievances and remanded the case with directions to grant summary judgment in favor of the defendant Company for the reason that the disputes as to which arbitration was sought by the Union arose between the time of the termination of a collective bargaining agreement which created the grievance procedure and the execution of a new agreement and therefore the employer was under no obligation to arbitrate the grievances. In rejecting a claim that the bargaining agreement continued in effect by reason of the action of the parties the court made the following statement which is equally applicable to the facts of the present case:

"We reject appellee's argument that the agreement continued in effect by reason of the action of the parties. On May 13, the employer offered to continue the agreement in effect for another limited period. This offer met

with a flat refusal from the union. The fact that the employer chose thereafter not to change many of the working conditions which had prevailed under the expired agreement does not tend in any way to establish that that agreement was, or was considered to be, or was treated as still effective. It is perfectly natural and customary that, in the short hiatus which is expected to occur between the expiration of one collective agreement and the negotiation of the next, no great change will be made in the existing conditions. Sometimes, as here, a part of the hiatus is covered by agreed-upon extension of the terms of the expiring agreement. Where no such extension is negotiated, or where the period of the extension has also expired, there is no ground whatever for considering that the old agreement still governs the relationship of the parties. [Citing cases]."

The above cited cases make clear that the absence of an effective Collective Bargaining Agreement at the time of the dispute which is the subject of an action does not oust this court of jurisdiction under Section 301 but requires a dismissal of the plaintiffs' claims on the merits.

In accordance with the foregoing the court concludes that the plaintiff has failed to demonstrate that there are genuine issues of material fact for trial. The undisputed evidence discloses that there was no Collective Bargaining Agreement in existence at the time of the plaintiffs' alleged wrongful discharge in February 1970 and therefore the plaintiffs' claims will be dismissed on the merits. The motion of the defendant Company and the defendant Unions for summary judgment hereby is SUSTAINED.

Since the plaintiffs' claims under Section 301 of the Labor Management Relations Act lack merit this Court declines to exercise pendent jurisdiction over the state claim for invasion of privacy. See Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

The decision of this Court to grant the defendants' motion

for summary judgment makes it unnecessary to consider the Company's motion to dismiss the claims of plaintiffs Fisher, Mumford, Manson, Schaffner, Killian, Kreigel and Davis for failure to state a claim on the ground that this Court's dismissal of prior actions brought by these plaintiffs bars plaintiffs from litigating breach of contract claims which could have been raised and determined in the prior actions.

However, the Court believes it should be noted that the plaintiffs' discharge has resulted in the initiation of civil rights actions in this Court and the filing of charges by many of the plaintiffs against the Company with various administrative agencies. In these efforts the plaintiffs were unsuccessful.

Civil Actions No. 4011, 4012, 4013, 4014, 4017, 4018 and 4019 in which plaintiffs alleged that the Company at the time plaintiffs were fired deprived them of a constitutionally guaranteed right of privacy were dismissed by this Court for failure to state a claim. An appeal in Civil Action No. 4017 was dismissed by the Sixth Circuit.

In September, 1970 plaintiff Fisher filed a racial discrimination complaint with the Ohio Civil Rights Commission. In May, 1970 plaintiffs Fisher and Mumford filed a charge with the Equal Employment Opportunity Commission alleging that their discharges violated Title VII of the Civil Rights Act of 1964. To date neither commission has found that Copeland was guilty of discrimination on the basis of race or sex with respect to the discharge.

In March, 1970 plaintiffs, Fisher, Mumford, Schaffner, Killiam and Manson filed a charge with NLRB alleging they were discharged for engaging in protected union activity. On April 30, 1970 all charges were dismissed by the Regional Director for the NLRB, Region 8. On appeal the Regional Director's dismissal was affirmed by the NLRB Appeals Section on July 17, 1970. In August, 1970 plaintiffs Fisher, Mumford, Kriegel, Schaffner, Killian and Herron filed charges with the NLRB against the defendant Union claiming that the

Union failed to exercise its statutory duty to represent them. On November 27, 1970 these charges were dismissed by the Regional Director for NLRB, Region 8. On March 3, 1971 the Regional Directors' dismissal was affirmed by the Appeals Section of the NLRB.

The defendant Copeland has been subjected to a series of burdensome and harassing litigations in the federal courts and before administrative agencies. The entire history of the litigation arising from the February, 1970 discharges discloses a total disregard for the established principle that the law will not tolerate a multiplicity of suits or needless litigation.

Accordingly, the motion of the defendant Company and the defendant Unions for summary judgment hereby is SUSTAINED and this action hereby is DISMISSED.

/s/ CARL A. WEINMAN,
Judge, U. S. District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 73-1802

CATHERINE FISHER, ET AL.,
Plaintiffs-Appellants,

vs.

COPELAND REFRIGERATION CORP., ET AL.,
Defendants-Appellees.

ORDER

(Filed June 6, 1974)

Before: PHILLIPS, Chief Judge, EDWARDS and LIVELY, Circuit Judges.

On receipt and consideration of the briefs and records and oral arguments in the above-styled cause,

The judgment of the District Court is affirmed for the reasons which have been fully stated in the Memorandum Opinion and Order of Senior District Judge Carl Weinman, filed June 4, 1973.

Entered by order of the Court

/s/ JOHN P. HEHMAN,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 73-1802

CATHERINE FISHER, ET AL.,
Plaintiffs-Appellants,

vs.

COPELAND REFRIGERATION CORP., ET AL.,
Defendants-Appellees.

ORDER

(Filed July 5, 1974)

Before: PHILLIPS, Chief Judge, EDWARDS and LIVELY, Circuit Judges.

On consideration of the petition for rehearing in the above-styled case; and

Noting nothing material therein which was not considered by this court before the issuance of its opinion,

Said petition for rehearing is hereby denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN,
Clerk

STATUTES

Section 301(a) Labor-Management Relations Act:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Federal Rules of Civil Procedure, Rule 56C (in part):

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

28 U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

28 U.S.C. § 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and arises under the Constitution, laws, or Treaties of the United States."

LETTERHEAD OF KAHN, DEES, DONOVAN & KAHN

May 20, 1969

Mr. David J. Fitzmaurice
Secretary-Treasurer, IUE, AFL-CIO
1126 Sixteenth Street, N. W.
Washington, D. C. 20036

Dear Mr. Fitzmaurice:

This will confirm our agreement, between your union, International Union, Electrical, Radio and Machine Workers, and its Local 725, and Copeland Refrigeration Corporation, that the contract which was signed on the 15th day of June, 1966, and which will expire at 11:59 P.M., June 1, 1969, will by mutual agreement of the company and the union, be indefinitely extended in order to avoid a lapse of contractual relations while awaiting resolution of the representation case known as Case No. 8-RC-7470, filed by the International Union of District 50, UMWA.

It is further agreed and understood that when the NLRB resolves the above question of representation, and a certification of a bargaining agent results, that the extension of the expiration date of the said contract will terminate sixty (60) days from the date of said certification.

If you agree with the contents of this letter, as setting forth the arrangement that has been made, I would appreciate it if you would sign your name in the lower left hand corner, indicating approval and agreement.

Sincerely yours,

KAHN, DEES, DONOVAN & KAHN
/s/ ARTHUR R. DONOVAN
Attorney and Agent for
Copeland Refrigeration Corp.

ARD:T
The above accurately
sets forth the agreement made

N1 (TYPED VERSION OF EXHIBIT N)

AFFIDAVIT

of John Kaplan, living at .....

.....

after being duly sworn, deposes and states

"I am employed by Copeland Refrigeration Corporation as Director of Industrial Relations."

.....

"I took part in a meeting with IUE representatives in about May, 1967 before the contract expired. At the meeting it was agreed that the contract would continue in effect on a day to day basis during the pending of the representation case with the NLRB. I believe our attorney, Mr. Donovan, who was present, sent a letter to the Union's International offices agreeing on extension.

Thus, the terms of the contract, except for union security and dues checkoff, have continued to date.

The actual language of the agreement to extend the contract and which I believe was put into the letter to the Union's International office was as follows:

'Employer extended the termination date of an existing contract with IUE in order to avoid a lapse of contractural relations during resolution of the representation case.'"

.....

"I have carefully read the above statement and certify that the facts as related are true and correct to the best of my knowledge and belief."

/s/ JOHN KAPLAN

"Subscribed and sworn to before me this 7th day of April, 1970."

/s/ DONALD HOWARD for the NLRB

E COURT, U.S.
OCT 31 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-366

CATHERINE FISHER, et al.,
Petitioners,

v.

COPELAND REFRIGERATION CORPORATION,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO,

and

LOCAL 725, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

BRIEF FOR RESPONDENT COPELAND REFRIGERATION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-366

CATHERINE FISHER, et al.,
Petitioners,

v.

COPELAND REFRIGERATION CORPORATION,
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO,

and

LOCAL 725, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Respondents.

BRIEF FOR RESPONDENT COPELAND REFRIGERATION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Copeland Refrigeration Corporation ("Copeland"), opposes the granting of a writ of certiorari in this matter, for the grounds set forth in this brief.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Sixth Circuit (Petition Appendix, pp. 38-39) and the memorandum opinion and order of the United States Dis-

trict Court for the Southern District of Ohio, Western Division, (Petition Appendix, pp. 25-37) are neither officially nor unofficially reported at this time. The Court of Appeals affirmance of the District Court order is noted at 497 F.2d 923.

JURISDICTION

Copeland agrees that the jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

COUNTER-STATEMENT OF QUESTION PRESENTED

The first question presented on plaintiffs' petition relates solely to the two union respondents. We submit the second question presented, which does concern Copeland, might more accurately be stated as follows:

> Whether the Court of Appeals correctly applied the controlling standards of review in affirming a summary judgment that no genuine issue of material fact existed to support the existence of an enforceable contract in an action brought under Section 301 of the Labor Management Relations Act, as amended (29 U.S.C. § 185).

Copeland contends this question should be answered "Yes".

COUNTER-STATEMENT OF THE CASE

Petitioners ("plaintiffs") are former employees of Copeland. The production and maintenance employees of Copeland at its Sidney, Ohio plant are represented for purposes of collective bargaining by the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 725 (the "International" and "Local

725", collectively the "Union"). The Union was also named as a defendant in this action, and as a respondent in this proceeding. The employees represented by the Union included plaintiffs while they were employed by Copeland.

This action was originally brought in the United States District Court, Southern District of Ohio, Western Division, by plaintiffs. Plaintiffs alleged that they had been discharged by defendant Copeland in violation of the collective bargaining agreement which they claimed was in effect at the time of their discharges in February, 1970. Plaintiffs further alleged that the Union had breached its statutory duty fairly to represent plaintiffs in contesting the discharges.

Copeland and Local 725 were parties to a collective bargaining agreement ("Agreement") which by its terms was effective from June 1, 1966 through June 1, 1969. This Agreement was one of a series of successive agreements between Copeland and Local 725. The Agreement provided that it could be terminated by written notice served by either party at least sixty days prior to its expiration date.

In a letter dated March 24, 1969, Nick York, President of Local 725, notified Copeland that Local 725 was terminating the 1966-1969 Agreement and that Local 725 desired to enter into negotiations with Copeland for a replacement agreement. On the same date, York also notified the Federal Mediation and Conciliation Service that Local 725 was terminating the Agreement. In accordance with these notices of termination, the Agreement terminated and expired at 11:59 p.m., June 1, 1969.

Prior to the expiration of the Agreement, the International Union took control of the affairs of Local 725 by placing the Local under administratorship effective March 25, 1969. Copeland was notified on April 1, 1969 that

administratorship had been imposed by the International Union.

At the time the agreement expired on June 1, 1969, a rival labor organization, District 50, United Mine Workers, was actively attempting to displace Local 725 as collective bargaining representative for Copeland's employees. Following a bitter campaign, an election was held by the National Labor Relations Board (the "Board") on June 19, 1969, to let the employees choose between these two unions. The Union won the election. District 50 filed objections, however, which delayed certification of the Union for nearly one year. Finally, on May 28, 1970, the Board dismissed the District 50 objections and certified the Union as representative of Copeland's employees.

On June 2, 1970, Copeland and the Union executed a Memorandum of Agreement which reinstated the terms of the collective bargaining agreement which had expired on June 1, 1969. The administratorship was removed by the International Union on June 8, 1970, fourteen months after it had been imposed. Thereafter, Local 725 resumed control of its affairs.

During the one-year period when there was no collective bargaining agreement in effect, Copeland maintained the status quo with respect to terms and conditions of employment such as rates of pay, seniority, "fringe" benefits and the handling of employee complaints. However, contract provisions with respect to compulsory union membership and deduction of union dues from employees' paychecks ceased upon expiration of the Agreement on June 1, 1969.

On May 27, 1969, Frank J. Gleason, President of Copeland, issued a letter to all employees stating Copeland's intention to continue unchanged the terms and conditions of employment in spite of the contract expiration during the hiatus when no labor organization represented Cope-

land's hourly employees because of the rival representation claim of District 50. The intention of the Company in this regard, during the period of the pendency of District 50's objections, was reaffirmed by Gleason in a letter dated July 1, 1969, which stated that conditions would be maintained despite the absence of a new agreement to replace the expired agreement.

The plaintiffs were discharged in February, 1970 for their participation in a sit-down strike against Copeland. Following their discharge, plaintiffs filed charges with the Board alleging that they had been discharged because of their union activities on behalf of District 50.[1] In connection with the processing of those discharges, John Kaplan, Director of Industrial Relations for Copeland, gave an affidavit to the Board on April 7, 1970. In that affidavit, Kaplan stated that he understood that the "contract" would continue after its June, 1969 termination, but that the provisions with respect to compulsory union membership and deduction of union dues from employees' paychecks would cease to be effective.

The Board's General Counsel found no merit in the unfair labor practice charge filed by the plaintiffs, and refused to issue complaints, based on the fact that plaintiffs had engaged in an unprotected "sit-down" strike against Copeland. The Board did not find that the strike engaged in by plaintiffs against Copeland was a strike in breach of a contract although this legal position had been forwarded by Copeland attorney Arthur Donovan as an alternate defense.

Subsequent to the institution of this action by plaintiffs,

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[1] "Although our contract expires as of the end of May, we will continue to operate as we have in the past, with regards to pay, fringe benefits, seniority, working conditions, grievances, etc." (App., *Infra*, p. 55)

the Union filed a motion for summary judgment which was supported by Copeland. Copeland and the Union contended that since there was no collective bargaining agreement in effect at the time of plaintiffs' discharges, such discharges could not constitute a violation of any contractual rights of plaintiffs and that, therefore, defendants were entitled to judgment as a matter of law.

The affidavits of each and every Union officer and official who had direct or supervisory control over Union affairs during the hiatus established that the Union did not enter into any collective bargaining agreement or agree to extend any collective bargaining agreement, either orally or in writing, with Copeland during that period. These agents of the Union included the Administrator who had charge of the affairs of Local 725, the President of Local 725, the President of the District Council of the International Union, and the Secretary-Treasurer of the International Union. There was no contrary evidence in the record which would indicate that either Local 725 or the International Union ever considered itself to be a party to any collective bargaining agreement, either written or oral, between June 2, 1969 and June 2, 1970.

Copeland, through its attorney Donovan, had proposed by letter of May 20, 1969, when Local 725 was under administratorship, that the Agreement which was to expire on June 1, 1969 be extended indefinitely. However, David J. Fitzmaurice, Secretary-Treasurer of the International Union, to whom this proposal was addressed, refused to sign this proposed extension and informed Donovan that the Union would not agree to such an extension.

Therefore, based on uncontradicted evidence, the District Court concluded that no collective bargaining agreement was in effect at the time of plaintiffs' discharges in February, 1970. Thus, as a matter of law, plaintiffs could

not establish any right to recovery based on the alleged existence of contractual rights. Accordingly, the District Court granted summary judgment and dismissed plaintiffs' complaint.

On appeal to the United States Court of Appeals for the Sixth Circuit, the Court of Appeals affirmed the finding of the District Court.

ARGUMENT FOR DENYING A WRIT OF CERTIORARI

I. THE DETERMINATION ON SUMMARY JUDGMENT THAT NO CONTRACT EXISTED AND, THEREFORE, NO CAUSE OF ACTION WAS STATED UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT DOES NOT RAISE ISSUES OF SUBSTANTIAL IMPORT BEFORE THE COURT AS TO NATIONAL LABOR POLICY OR CIVIL PROCEDURE.

A. A determination as to the existence of an enforceable contract is fundamental to any cause of action under Section 301 of the Labor Management Relations Act.

Absent an enforceable collective bargaining agreement, a suit cannot be maintained under Section 301 of the Labor Management Relations Act. *Adams* v. *The Budd Company,* 349 F.2d 368 (3 Cir. 1965); *Baker* v. *Fleet Maintenance, Inc.,* 409 F.2d 551 (7 Cir. 1969); *Globe Seaways, Inc.* v. *National Marine Engineers Ben. Ass'n,* 451 F.2d 1159, 1163 (2 Cir. 1971).

Plaintiffs contend that they have enforceable contractual rights under Section 301 by virtue of an alleged oral

extension of the collective bargaining agreement between the Company and the Union which expired as of June 1, 1969. In the alternative, plaintiffs argue that the expired agreement continued by implication or by estoppel. While the plaintiffs advance various contentions and arguments to support their position that a contract was in effect at the time of their discharge, the District Court concluded that the uncontradicted evidence established that no collective bargaining agreement was in effect at the time that plaintiffs were terminated by Copeland. The Court of Appeals affirmed this conclusion in all respects.

The District Court, in finding no contract, rejected the same theories and arguments that are now being advanced by the plaintiffs to this Court. The question before the District Court on summary judgment was whether a contract existed. It was within the province of the District Court to grant summary judgment where the undisputed evidence established that no collective bargaining agreement existed at the time of plaintiffs' termination. Other courts have acknowledged the propriety of summary judgment in these circumstances. *Baker* v. *Fleet Maintenance, Inc., supra; Lear Siegler, Inc.* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.,* 287 F. Supp. 692 (W.D. Mich. 1968). Moreover, courts have rejected the theories advanced by plaintiffs as to the existence of a contract by implication or estoppel. *Baker* v. *Fleet Maintenance, Inc., supra; Procter & Gamble Independent Union, etc.* v. *Procter & Gamble Mfg. Co.,* 312 F.2d 181 (2 Cir. 1962), cert. den., 374 U.S. 830 (1963); *A. S. Abell Company* v. *Baltimore Typographical Union No. 12, et al.,* 85 LRRM 2368 (D.C. Md. 1974); *Food Handlers, etc.* v. *Arkansas Poultry Co-op, Inc.,* 199 F. Supp. 895 (W.D. Ark. 1961).

The issue presented to the Court by this writ is, therefore, neither novel nor unique to questions raised in suits involving Section 301.

A determination as to the existence of a contract is essential to any action of this nature. While facts and circumstances may vary results in determining the existence of a contract under the accepted principles in Section 301 cases, the facts before the Court in this case do not present substantive issues of contractual law that are of importance to national labor policy. Rather, under the facts, plaintiffs seek to overturn established national labor policy as to both the representation rights of employees and the contractual relationship between employers and unions.

1. The undisputed evidence disclosed that no agreement, either oral or written, existed between Copeland and the Union at the time of plaintiffs' discharges.

The formation and existence of a collective bargaining agreement ordinarily consists of the normal contract rules of offer, acceptance, and intent. *See, Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 513 (1962). The District Court, in granting summary judgment to the defendants, considered affidavits of each and every Union official and officer having responsibility for the affairs of the Union during the period from March 24, 1969 – when the Union gave notice to terminate the contract – until June 2, 1970 – when the Company and the Union agreed in writing to reinstate the Agreement. Each of these affidavits unequivocally stated that no agreement of any sort was in

effect between Copeland and the Unions during that period. These affidavits are uncontradicted.

Although Copeland sought to extend the Agreement which was to expire on June 1, 1969, this proposal was rejected by the Union. At the time that the Company proposal was made, May 20, 1969, the Local 725 was in administratorship. It is undisputed that the International Union, through David J. Fitzmaurice, Secretary-Treasurer, refused to sign any extension and informed Copeland of the Union's refusal to enter in any agreement extending the contract.

Plaintiffs' argument that an oral agreement existed between the parties is not supported by the evidence and there is no genuine factual issue as to such an oral agreement.[2] Again, the uncontradicted evidence established that the Union had never agreed to any extension, either oral or written, of the contract. In this connection, when the parties did in fact reinstate the terms of the expired agreement in June, 1970, they did so pursuant to a written agreement, executed immediately after the Union was certified by the National Labor Relations Board on May 28, 1970.

Nor is plaintiffs' reliance on Kaplan's affidavit well-founded. The same affidavit makes it clear that Kaplan was mistakenly refering to the proposed letter-extension which the Union had rejected unsigned, and that, significantly,

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[2] The District Court found that the termination letter of March 24, 1969, from Local 725 President York to Copeland was effective to terminate the Agreement in accordance with its terms on June 1, 1969. Plaintiffs, in their petition, do not contest the effectiveness of this termination letter to accomplish that purpose. Therefore, absent subsequent action by Copeland and the Union, the Agreement ceased to be effective as of June 1, 1969. *Paterson Parchment Paper Co.* v. *International Brotherhood of Papermakers*, 191 F.2d 252 (3 Cir. 1951), cert. den. 342 U.S. 933 (1952).

the union shop and dues check-off were not extended. (App., *Infra*, p. 102) In sharp and revealing contrast are the letters from Copeland's President Gleason of May 27 and July 1 (App. Infra pp. 55 and 56) in which on both those *highly significant dates, all employees were informed that* the contract expired as of the end of May, but that the working conditions, including grievances, would continue unchanged during the contract hiatus. And of course the contentions of Copeland's attorney, Donovan, before the Board are no evidence at all. "Statements of legal theory advanced by the Company in processing grievances or in resisting unfair labor practice charges before the NLRB are not binding on the Company or this Court where the facts disclose that a Collective Bargaining Agreement was not in existence at the time of the plaintiffs' discharge." (Petition App. p. 31)

Accordingly, based on the foregoing, the District Court properly found, "The undisputed evidence disclosed that no oral agreement extending the duration of the 1966 to 1969 bargaining agreement was entered into by the parties."

2. The plaintiffs alternate assertions that a contract existed by implication or by estoppel are unsupported by fact and law.

In the alternative, plaintiffs contend that an implied contract could be found to exist between Copeland and the Union by the conduct and representations of the Company and the Union. Plaintiffs' attempt to support this argument by the fact that wages, fringe benefits, the grievance procedure and other conditions of employment were maintained by Copeland following the termination of the Agreement. The assertion that a contract existed by implica-

tion, based on the foregoing, is both factually and legally unsupportable.

The maintenance of the status quo of these conditions of employment following termination of the Agreement was not optional with Copeland. Rather, the duty to bargain established by Section 8 (a) (5) of the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 *et seq.* (the "Act"), prohibits an employer from making unilateral changes in terms and conditions of employment prior to bargaining with the union. *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962).[3] The fact that the prior collective bargaining agreement has been terminated, as in this instance, does not alter the conclusion that such unilateral action by an employer is unlawful. Thus, the alteration of grievance procedures and modification of seniority rights, even after an agreement has expired, constitutes a refusal to bargain when unilaterally undertaken by an employer. *Industrial Union of Marine and Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615 (3 Cir. 1963), cert. den. 315 U.S. 984 (1964).

Copeland could not bargain with the Union as to changes, or make unilateral changes in conditions, for it was faced with a rival representation claim. In such circumstances, Copeland was prohibited from bargaining with either of the rival unions until the question of representation was resolved by the National Labor Relations Board. "Employers who have entered a collective bargaining agreement with a union when a real question as to representation existed have been held responsible for committing an unfair

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[3] Whether the duty of the Company arises under Section 8(a)(5) by reason of the *Katz* case or under Section 8(a)(1) of the Act (see, e.g., decision of this Court in *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405 (1964)), it is clear that the Company was compelled to refrain from making unilateral changes in wages and working conditions during the pendency of the rival-union representation question.

labor practice [citation omitted]." *N.L.R.B.* v. *Signal Oil and Gas Co.*, 303 F.2d 785, 787 (5 Cir. 1962).

Plaintiffs' claim that unilateral changes could be made without violating the Act because bargaining was not in progress is, therefore, not supported by the cases referenced. (Petition, fn. 8, pp. 18-19). Rather, the law requires Copeland to remain neutral and not alter existing terms and conditions of employment. *Midwest Piping & Supply, Inc.*, 63 NLRB 1060 (1945).

Therefore, Copeland had no choice but to continue unchanged the terms and conditions of employment as they existed under the expired agreement. Certainly, the fact that Copeland followed this legally compelled course of action cannot be viewed as evidence that any agreement to do so was in effect. *Baker* v. *Fleet Maintenance, Inc., supra; Procter & Gamble Independent Union* v. *Procter and Gamble, supra; A. S. Abell Company* v. *Baltimore Typographical Union No. 12, et al., supra.*

Copeland's acknowledgement of these principles of law and of its intention to comply with them by its letters to employees, even though the contract between Copeland and the Union had terminated, cannot be construed as an implied obligation to continue the contract in effect.

Not all the terms and conditions of employment must be continued by the employer absent bargaining with the Union when the agreement expires. Union security and dues check-off are matters of contract and, therefore, do not survive the termination of an agreement. *Industrial Union of Marine and Shipbuilding Workers* v. *N.L.R.B., supra* at 610; *Bethlehem Steel Company,* 136 NLRB 1500 (1962). Copeland's status quo position is further fortified by the fact that the undisputed evidence showed that neither the union security clause nor the dues check-off clause continued beyond the expiration date of the Agreement.

The conduct of the parties provides no basis for any inference that an implied contract existed in this case. The maintenance of the "status quo" between agreements is not unusual. *Procter and Gamble Independent Union, etc.* v. *The Procter and Gamble Mfg. Co., supra* at p. 184.

Plaintiffs further assert that a contract implied in law should be found to exist based upon *John Wiley and Sons* v. *Livingston*, 376 U.S. 543 (1964). In the *Wiley* case, the Court put a successor employer in the position of the original employer, requiring that the successor employer arbitrate matters which arose under the original employer's contract. The holding of *Wiley* was "properly cautious and narrow". *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, etc.*, — U.S. —, 41 L.Ed.2d 46, 94 S.Ct. — (June 3, 1974). Here, plaintiffs seek to extend the consensual relationship between the parties after it had expired. Such an extension would contradict the fundamental principles of Section 301, of encouraging voluntary agreement and then enforcing that agreement. When parties agree to a termination date – a significant element to both employer and union – that agreement too, should be carried out.[4]

Therefore, an implied contract cannot under these circumstances be found to exist.

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[4] A "fundamental premise" of federal labor policy is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract". *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, etc., supra*, at p. 52; *N.L.R.B.* v. *Burns International Security Services*, 406 U.S. 272, 287 (1972); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 108 (1970). Even in *Wiley* the Court would not force upon the parties "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved", 376 U.S. at page 551.

II. THE COURTS BELOW DID NOT ABUSE THEIR AUTHORITY OR ACT ERRONEOUSLY IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Court of Appeals, in reviewing the District Court's memorandum opinion and order, obviously considered the propriety of the District Court's action in granting summary judgment. It affirmed the District Court's granting of summary judgment upon the District Court's opinion, and thus for the reason that the undisputed evidence demonstrated that no contract existed at the time of plaintiffs' termination. Plaintiffs seek to resist uncontroverted facts by rationale and arguments which are not supported by law. Plaintiffs have sought to establish a contract in the face of facts leading solely to the conclusion that no contract existed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied. In summary, plaintiffs present only an argument supporting a case which they urge has been wrongly decided. The courts below have not created any conflict with the rulings of other courts, nor have they infringed any principles of national labor policy. The question before the lower courts was simply whether or not there was sufficient evidence to support a genuine claim that a contract existed. The courts below found the undisputed evidence to be that no contract existed at the time of plaintiffs' discharge. Accordingly, no cause of action

existed under Section 301 and summary judgment was properly granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-366

CATHERINE FISHER, ET AL., *Petitioners,*

v.

COPELAND REFRIGERATION CORP., ET AL., *Respondents.*

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF OF RESPONDENTS INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AND ITS LOCAL 725, IN OPPOSITION

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OPINION BELOW

The United States Court of Appeals for the Sixth Circuit wrote no opinion but entered an order affirming for the reasons stated in the Memorandum Opinion and Order of the district court. The order of the court of appeals is printed as an appendix to the petition for a writ of certiorari (p. 38). The opinion of the district court is not reported but is reproduced as an appendix to the petition for a writ of certiorari (pp. 25-37).

QUESTIONS PRESENTED

1. Whether a complaint alleging that a union breached its duty of fair representation by failing to arbitrate grievances filed by the plaintiffs against their former employer was properly dismissed on the merits on the ground that no collective bargaining agreement was in existence at the time the grievances arose.

2. Where the plaintiffs sued under Section 301 of the Labor Management Relations Act alleging that they were wrongfully discharged in violation of an existing collective bargaining agreement, did the court properly grant summary judgment for the defendants where the undisputed evidence established that no contract was in existence at the time of the discharges.

STATEMENT OF THE CASE

The Facts

Copeland Refrigeration Corporation, hereinafter called the Company, and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 725, hereinafter called IUE, were parties to a 1966 collective bargaining agreement applicable to the production and maintenance employees at the Company's Sidney, Ohio plant. The agreement expressly provided for termination on June 2, 1969 if either party gave notice of termination on or prior to that date (Pet. pp. 26-27).[1] On March 24, 1969 the IUE gave notice of termination, which both the Company and the IUE construed as terminating the agreement in accordance with its terms (Pet. pp. 4, 27-29).

[1] All page references are either to the petition for a writ of certiorari or to the appendix printed as part of the petition for a writ of certiorari.

On April 1, 1969, the International Union of District 50, United Mineworkers of America, filed a representation petition with the National Labor Relations Board seeking to be certified as the representative of the production and maintenance workers at the Company's Sidney, Ohio plant (Pet. pp. 4, 28). Although the Company sought to induce the IUE to agree to extend the terms of the prior collective bargaining agreement during the pendency of the representation proceeding, the IUE, on the advice of counsel, refused to negotiate a new collective bargaining agreement or to extend the 1966 agreement while there was a representation proceeding filed by another union pending (Pet. p. 28).

Not until June 1, 1970, after the IUE won the election conducted by the NLRB and the representation proceeding was finally concluded in the IUE's favor, did the IUE agree again to put into effect the agreement which had expired on June 2, 1969 (Pet. pp. 4, 28-29).

In February 1970, ten employees, who were the plaintiffs below, and are the petitioners here, were discharged by the Company for having allegedly participated in a sit-down strike at the Company's Sidney, Ohio plant (Pet. pp. 4, 31). They filed grievances alleging that they had been unlawfully discharged but the IUE did not seek arbitration because of the absence of any collective bargaining agreement at the time of the discharges (Pet. p. 26).

The Proceedings in the District Court

The plaintiffs filed suit in the district court under Section 301 of the Labor Management Relations Act, 29 USC 185, alleging that the Company breached its

collective bargaining agreement with IUE by discharging the plaintiffs and that IUE breached its duty of fair representation by refusing to take to arbitration the grievances over their discharges (Pet. pp. 25-26).

The Company and the IUE filed a Motion for Summary Judgment for lack of subject-matter jurisdiction for the reason that no collective bargaining agreement was in effect at the time of the discharges (Pet. p. 26). The court held that jurisdiction over the subject matter did exist (Pet. p. 35) but that there was no genuine issue of material fact (Pet. p. 35).

With respect to plaintiffs' contention that the Company and the IUE had orally agreed to extend the 1966 Collective Bargaining Agreement, the court pointed out that no oral agreement could be found since the evidence on which plaintiffs relied to establish the oral agreement showed that agreement was expressly made dependent on the signature of IUE Secretary Treasurer David J. Fitzmaurice and he had refused to sign (Pet. pp. 30-31).[2]

The district court carefully analyzed the plaintiffs' contention that the continuance in effect unchanged of the wages, hours and other substantive terms of employment (excluding check off and union security—see Pet. p. 5, fn. 2) after termination of the 1966 Collective Bargaining Agreement afforded the basis for implying that an agreement did exist (Pet. pp. 32-35). The court determined that the Company maintained the working conditions unchanged for the purpose of avoiding the potential liability of an unfair labor prac-

[2] In their petition for a writ of certiorari, petitioners admit that Fitzmaurice never signed the tendered letter reciting the oral agreement dependent upon his signature (Pet. p. 5).

tice which would arise if it violated the duty of neutrality during a representation contest between two unions or if it unilaterally changed conditions without bargaining (Pet. pp. 31-33). These legal consequences of a change explained the continuance of the terms and conditions of employment as they existed under the previous agreement and negated the inference that the Company had impliedly extended the duration of the 1966 Collective Bargaining Agreement (Pet. p. 33).

The district court accordingly held that, "The undisputed evidence discloses that there was no Collective Bargaining Agreement in existence at the time of the plaintiffs' alleged wrongful discharge in February 1970 and therefore the plaintiffs' claims will be dismissed on the merits" (Pet. p. 35).

Upon appeal the court of appeals entered an order affirming the judgment below for the reasons set forth in the district court's opinion and order (Pet. p. 39). The court of appeals did not write any opinion.

REASONS FOR DENYING THE WRIT

1. No Issue Respecting Dismissal for Lack of Jurisdiction is Presented

The district court expressly held that "the absence of an effective Collective Bargaining Agreement at the time of the dispute which is the subject of the action does not oust this court of jurisdiction under Section 301" (Pet. p. 35). Rather, the absence of a collective bargaining agreement was held to require dismissal of the plaintiffs' claims "on the merits" and the claims were "dismissed on the merits" (Pet. 35). The court of appeals affirmed for the reasons stated by the district court (Pet. p. 38).

The first question which petitioners set forth (Pet. p. 32) raises solely the issue of a dismissal for lack of jurisdiction. Since the courts below refused to dismiss for lack of jurisdiction but rather dismissed on the merits, this question is not here presented.

2. The Factual Challenge to the Finding That No Contract Existed Does Not Present Any Issue Which is Deserving of Review Here

The second of the questions presented in the petition raises solely issues of fact (Pet. p. 2). Thus the second question contains two evidentiary allegations which were urged below as showing a contract did exist at the time of the discharges and which were rejected by the courts below (Pet. pp. 30-33). The first of these was the alleged oral agreement; the second, the alleged belief of the Company, the IUE and all the employees that the contract was in existence, operated under and relied upon (Pet. pp. 2-3).

The correctness of resolutions of evidentiary issues does not serve to invoke review by this Court.

3. The Decision Below Presents No Conflict With Any Decision of This Court or With Any of the Courts of Appeals

The petitioner (Pet. p. 14) argues that a conflict between the circuits exists "if the holding below—that the mere refusal of the union to initial the Donovan letter of May 20, 1969 negates the existence of a contract—represents a determination of law." The petition does not identify which circuit allegedly adopted a conflicting principle nor which cases present the alleged conflict. The district court did not rule as a matter of law that the refusal of the union to initial the letter prevented the existence of a contract. Rather the failure to initial was a fact which, in view of the

view of the district court, made "clear that there was no meeting of the minds between the parties extending the 1966 to 1969 Collective Bargaining Agreement" (Pet. p. 31). Hence none of the cases cited (Pet. pp. 13-16) are in conflict. Each case turned on an evidentiary determination of whether or not a contract existed. None announces any rule of law in conflict with the decisions below.

The contention that this Court in *John Wiley* v. *Livingston,* 376 U.S. 543 (1964) authorized arbitration of "rights created not by a consensual act but rather by law" (Pet. p. 19) ignores the fact that the rights arbitrated in *Wiley* had a contractual basis since the issue there was not whether any contract existed but whether the successor employer was bound by the predecessor employer's collective bargaining agreement.

4. No Important Issue of Law Is Presented by the Decision Below

The essence of the petition seems to be that an important issue is presented by the injustice allegedly suffered by rank and file members of a union by being deprived of their "legitimate expectations" that they have the right of arbitration when, upon the expiration of a collective bargaining agreement, wages, hours and working conditions remain unchanged (Pet. p. 18). However, the discontinuance of union security and check off, as the petition admits occurred here (Pet. p. 5, fn. 2), certainly alerted all employees to the fact that the collective bargaining agreement was no longer in effect. Indeed, it seems likely that the plaintiffs relied upon the absence of a no-strike bar when they went on the strike which resulted in their discharges.

The decisions below do not present any important issue of law.

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

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